"THE LETTER KILLETH, BUT THE SPIRIT MAKETH ALIVE."

In the issue of *The Public* on the 14th of September, Chief Justice Walter Clark, of North Carolina, contributed an article entitled "Making the Word of None Effect by Their Traditions," the design of which was to show that the courts had usurped the right to pass on the constitutionality of statutes enacted by Congress. The author asserted, as others have done, that that power was not *expressly* given by the Constitution, and, in fact, was not given to the courts at all; that Hamilton has said that there was not a syllable in the Federal Constitution giving the courts this power; that Jefferson, after the decision in Marbury *v.* Madison, promptly denied the existence of such a power; that Jackson had refused to have executed a judgment of the Supreme Court in such an instance, and that certain others of a later day, and even in our own day, have held the same view.

That there was no express grant of this power to the courts, that is, in so many words, cannot well be denied, but, it may be asserted, that it is not necessary that there should be an express grant, it will suffice if it is found that there is a *necessary implication* of it, when the Constitution is read from its four corners, in order to carry out the principles involved in a *limited* constitution.

That the learned author misconstrued the observation of Hamilton "in the 81st Federalist" will be readily discerned by a reference to the 78th Federalist, where Hamilton declares that "the complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution I understand *one which contains certain specified exceptions to the legislative authority;* such, for instance as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare *all acts contrary to the manifest tenor of the Constitution void.* Without this, all the reservations of particular rights or privileges would amount to nothing."

Following up that conclusion, he takes occasion to say: "There is no position which depends upon clearer principles than that

every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid."

I quote from Hamilton with a two-fold proposition in view: First, to show that the learned author was entirely mistaken as to Hamilton's opinion on this subject, if he meant to say that Hamilton was of *his* opinion; and, secondly, to show that by a logical analysis of the Constitution and a proper interpretation thereof in the light of that analysis, such a power inevitably and necessarily results to the courts.

In pursuing this inquiry, he used, as usual, his great powers of intellect and application with logical force; he goes on to say: "If it be said that the legislative body are in themselves the constitutional judges of their own powers and that the construction they put upon them is conclusive upon the other departments, it may be answered *that this cannot be the natural presumption where it is not to be collected from any particular provisions in the Constitution.* It is not otherwise to be supposed that the Constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the legislature and the people, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It, therefore, belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."

The assertion that such a power resides in the courts, is not tantamount to asserting that the courts are superior to the legislative body, as some have argued. "It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental." And it may be confidently said that while this authority is not "derived from any positive law," perhaps, it nevertheless proceeds "from the nature and reason of the thing."

In disposing of the statement that the courts "huddle up their decisions in secret conclave," and, therefore, are more "likely to conspire against the rights of the people than is the legislature," Hamilton argues thus: "It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise *will* instead of *judgment,* the consequence would equally be the substitution of their pleasure to that of the legislative body. *The observation, if it proves anything, proves that there ought to be no judges distinct from that body.*"

From time to time, circumstances arise which incite the people to demand a certain matter of legislation (as the Child Labor Law, for instance, with the object of which I agree, but not the right on the part of Congress to do it), and, as a rule, when the demand is great and the pressure strong, Congress yields (if not at first, at last), sometimes against its will and better judgment, but it is *vox populi vox Dei,* usually with them, because the ballot made the congressman and the ballot can unmake him, of which fact he is generally not unconscious. Speaking to this point, that great contemporary and, in fact, co-maker of the Constitution made use of this comment: "This independence of the judges is equally requisite to guard the Constitution and the

rights of individuals from the effects of those ill humors which the arts of designing men or the influence of particular conjectures sometimes disseminate among the people themselves, and which, though they speedily give way to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. Though I trust the friends of the Constitution will never concur with its enemies, in questioning that fundamental principle of republican government which admits the right of the people to alter or abolish the established Constitution, whenever they find it inconsistent with their happiness, yet is not to be inferred from this principle that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents, incompatible with the provisions of the existing Constitution, would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape than when they had proceeded wholly from the cabals of the representative body. Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge, of their sentiments can warrant their representatives in a departure from it prior to such an act. But it is easy to see that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution where legislative invasions of it had been instigated by the major voice of the community." This power "not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them, who, perceiving that obstacles to the success of iniquitous intentions are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate to qualify their attempts. This is a circumstance calculated to have more influence upon the character of our government than but few may be aware of. The benefits of the integrity and moderation of the judiciary have *already been felt in more states than one;* and though they may

have displeased those whose *sinister expectations they have disappointed,* they must have commanded the esteem and applause of all the *virtuous and disinterested.*" This latter statement, coming from the authority that it does, ought to dispose of the statement that such a power is an unheard of one. "Considerate men, of every description, ought to prize whatever will tend to beget or fortify that temper in the courts, *as no man can be sure that he may not be to-morrow the victim of the spirit of injustice by which he may be a gainer to-day.* And every man must now feel that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence, and to introduce in its stead universal distrust and distress."

Having in mind the frailties of human nature, when subjected to strong temptations, as when their political or official existence is threatened, Hamilton contended that it was right that the judges should be independent of both the legislative and executive departments of the Government, because, if it were otherwise, "there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws."

To demonstrate the necessity of this power as a part of the judicial authority, he uses this simple, but impressive, illustration: "If the Federal Government should overpass the just bounds of its authority and make a tyrannical use of its powers, the people, whose creature it is, must appeal to the standard they have formed, and take such measures to redress the injury to the Constitution as the exigency may suggest and prudence justify. The propriety of a law, in a constitutional light, must always be determined by the nature of the powers upon which it is founded. Suppose, by some forced constructions of its authority (which, indeed, cannot easily be imagined), the Federal legislature should attempt to vary the law of descent in any state, would it not be evident that in making such an attempt it had exceeded its jurisdiction and infringed upon that of the state? Suppose, again, that upon the pretense of an interference with its revenues, it should undertake to abrogate a land tax imposed

by the authority of a state; would it not be equally evident that this was an invasion of that concurrent jurisdiction in respect to this species of tax which its Constitution plainly supposes to exist in the state governments? If there should ever be a doubt on this head, the credit of it will be entirely due to those reasoners who, in the imprudent zeal of their animosity to the plan of the convention, have labored to envelop it in a cloud calculated to obscure the plainest and simplest truths.

"But it is said that the laws of the Union are to be the *supreme law* of the land. But what inference can be drawn from this, or what would they amount to, if they were not supreme? It is evident they would amount to nothing. *A law,* by the very meaning of the term, includes supremacy. It is a rule which those to which it is prescribed are bound to observe. This results from every political association. If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted to it by its constitution, must necessarily be supreme over the societies, and the individuals of whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties, and not on a government, which is only another word for *political power and supremacy.* But it will not follow from this doctrine that acts of the larger society which are *not pursuant* to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. These will be merely acts of usurpation, and will be treated as such. Hence, we perceive that the clause which declares the supremacy of the laws of the Union, like the one we have just before considered, only declares a truth, which follows immediately and necessarily from the institution of a federal government." The result would have been the same, if that declaration had been left out, but which was inserted out of a superabundance of caution. If there had been any doubt in the minds of the members of the convention of the existence of such a power, it would doubtless have been inserted in express terms. The truth is, that every member of the convention, with the ex-

ception of two, was in favor of and understood that by the Constitution such a power resided in the courts.

"It will not, I presume, have escaped observation," pithily remarks Hamilton, "that it *expressly* confines this supremacy to laws made *pursuant to the Constitution;* which I mention merely as an instance of caution in the convention; since that limitation would have to be understood, though it had not been expressed." Where they thought there would be a misconstruction of the Constitution they obviated a possible misconstruction by an express statement, when the possibility of a misconstruction was suggested, but in the matter now under discussion there was no doubt in the minds of the makers of the Constitution, and therefore, no necessity for redundancy. It is perfectly apparent that some of the statements and declarations "are only declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government, and vesting it with certain specified powers. This is so clear a proposition that moderation itself can scarcely listen to the railings which have been so copiously vented against this part of the plan, without emotions that disturb its equanimity."

Another very good reason in favor of the existence of such a power in the courts is, that "the members of the legislature will be rarely chosen with a view to those qualifications which fit men for the stations of judges; and as, on this account, there will be great reason to apprehend all the consequences of defective information, so, on account of the natural propensity of such bodies to party divisions, there will be no less reason to fear that the pestilential breath of faction may poison the fountains of justice. The habit of being habitually marshalled on opposite sides will be too apt to stifle the voice both of law and of equity." Is not the truth and force of this statement verified almost every day, both in Congress and state legislatures? Do we not find it, although somewhat hidden and obscured by contrary professions of the speakers, taking place on the vital matters in the prosecution of the war? Each party is bent on controlling the Congress and government generally and is doing everything that can possibly be done, which will not be entirely misunderstood, to work out an advantage to itself in almost every matter which

comes up for consideration. To illustrate, again, at this very date, the legislative body of Sweden, composed of about an hundred members, has in it but eleven lawyers. "Considerations such as these teach us to applaud the wisdom of those states who have committed the judicial power, in the last resort, not to a part of the legislature, but to a distinct and independent body of men."

This statement, now often reiterated, that such a power is a *novel one* is met by Hamilton in this way: "Contrary to the supposition of those who have represented the plan of the convention, in this respect, as novel and unprecedented, it is but a copy of the Constitutions of New Hampshire, Massachusetts, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia; and the preference to those models is highly to be commended."

It is quite true, as said by the learned jurist heretofore mentioned, that Hamilton did say that there was not a syllable in the plan *directly* empowering the national courts "to construe the laws according to the spirit of the Constitution, or which gives them any greater latitude in this respect than may be claimed by the courts of every state."

But, after saying that, he continues as follows: "I admit, however, that the Constitution ought to be the standard of construction for the laws, and that wherever there is an evident opposition, the laws ought to give place to the Constitution. But this doctrine is not deducible from any circumstances peculiar to the plan of the convention, *but from the general theory of a limited Constitution;* and as far as it is true, is equally applicable to most, if not all of the state governments. There can be no objection, therefore, on this account, to the federal judicature which will not lie against the local judicatures in general, and which will not serve to condemn every constitution that attempts to set bounds to legislative discretion."

The same learned jurist uses in justification of his position the fact that both Jefferson and Jackson defied the Supreme Court, when it had exercised that power, but it does not seem to me to be good argument, when we must remember that certainly Jefferson, and, I think, Jackson, too, was a political enemy of the great Chief Justice. I am a believer and disciple, in the main, of

both of these eminent personages, but, with all respect to their memories, I am frank enough to believe that they were swayed by political considerations or personal animosities. If *"force creates right,"* as Bismarck contended to be the case, holds good, then there may be argument in the above suggestion, otherwise there is not.

If there is anything in *reason* the impelling logic of Hamilton ought to satisfy the most obstreperous ultrademocrat, as to the necessity of and reason for the existence of this power, which is *neither novel or dangerous,* in any vital sense of the latter word, but an altogether reasonable power, when the Constitution is read and considered from its four corners. In it is contained the balance wheel of our government, and the palladium of our liberties, which in the years to come will keep us clear of the dangers which have encompassed and overcome many of the other governments of the world.

To Justice Clark's theme, "Making the *Word* of None Effect by Their Traditions," I, therefore, reply, "The *Letter* Killeth, but the *Spirit* Maketh Alive."

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